PENINSULAR CONCORD SDN BHD v. SYARIKAT BEKALAN AIR SELANGOR

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 11ANCVC-4-01-2014]
3 JULY 2014

CIVIL PROCEDURE: *Limitation – Cause of action – Accrual of – When cause of action accrued – Whether time expressed to run from date of occurrence of damage – Whether discoverability rule applied – Whether cause of action barred by limitation – Limitation Act 1953, s. 6*

The respondent supplied treated water to consumers in Selangor who were its account holders. The appellant owned two premises at Taman Sri Batu Caves ('the appellant's premises') and was an account holder with the plaintiff. On 7 March 2003, the appellant closed its account with the respondent and accordingly the respondent disconnected water supply by removing the meter affixed to the pipeline connected to the appellant's premises. This meant that the appellant's premises no longer received any water supply. However, on 14 May 2007, the respondent received a report about theft of water taking place at the appellant's premises. On the same day, the respondent despatched a team of officers to the appellant's premises and found an unauthorised pipe connection tapping water off the respondent's main pipe without a meter. By this illegal connection the appellant was able to receive water from the main pipe *albeit* without a meter to monitor the quantity being consumed. In consequence, by a letter of demand dated 22 March 2013, the respondent demanded the payment of RM72,114.98 from the appellant being the charges due for water that was stolen. On 2 May 2013, the respondent instituted an action to recover the sum due from the appellant and one Mohd Ariff bin Abdul Aziz, the person to whom the appellant had intended to sell the premises during the material time, based in contract and tort. The appellant in its defence, *inter alia*, pleaded that the respondent's cause of action in contract or tort was barred by limitation. Subsequently, the respondent filed an application for summary judgment pursuant to O. 14 of the Rules of Court 2012 ('ROC') against the appellant based on the presumption contained in s. 123 of the Water Services Industry Act 2006. The appellant opposed the application on the ground that the question of whether the claim was barred by limitation was a serious triable issue that ought to be decided at trial. The appellant's argument did not find favour with the Magistrate who allowed the respondent's application. Dissatisfied, the appellant appealed to the High Court. The issues that arose for determination was when, in the circumstances set forth in the statement of claim, did the respondent suffer damage. If the respondent suffered damage when the water theft first started, then the claim in tort would be time-barred under s. 6 of the Limitation Act 1953 ('the Limitation

Act'). On the other hand, if the cause of action did not accrue until the respondent discovered the water theft ('the discoverability rule'), then the claim was not caught by limitation. As such, the limitation issue turned on whether the discoverability rule was applicable to the respondent's cause of action in tort.

Held (dismissing appeal with costs):

(1) It was unreasonable and untenable in principle that a cause of action should be held to accrue before it is possible to discover any injury. To require a respondent to bring a cause of action before he could reasonably have discovered that he had a cause of action was unjust. The diligence rationale for the limitation regime would not be undermined by the application of the discoverability rule. Any additional difficulty that the appellant may have to face in dealing with a claim years afterwards could not be a justification to deny a respondent's right to bring an action before he even knows he had one. It was inequitable to accept a rule of interpretation which would favour the appellant at the expense of the respondent. (para 40)

(2) The Limitation Act does not contain any definition of the phrase "cause of action". As time is not expressed to run from the date of the occurrence of the damage, there is no requirement for it to be interpreted as if it was. The policy of the law should be to advance rather than to deny or retard a respondent the accrual of a cause of action. (para 41)

(3) Section 6(1) of the Limitation Act is not worded to read that an action is to be commenced within a specified time from the occurrence of a specific event. The respondent did not know and could not have discovered the illegal pipe connections at the appellant's premises until it was alerted in May 2007. Thus, the respondent's cause of action only accrued in May 2007 when the respondent discovered the water theft and, as such, the Magistrate was right in concluding that there was no triable issue and rejecting the defence of limitation. The respondent's writ which was issued on 2 May 2013, had a valid and subsisting cause of action against the appellant which was not foreclosed by s. 6 of the Limitation Act. (paras 42, 44 & 45)

(4) The principle of the Limitation Act is that time runs against a respondent only from the time he knows or becomes aware of his rights. The purpose of limitation was to ensure that those who go to sleep on their claims should not be assisted by the courts. (para 46)

Case(s) referred to:

AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
AmBank (M) Bhd v. Kamariyah Hamdan & Anor [2013] 5 MLJ 448 ***(refd)***
Cartledge v. E Jopling & Sons Limited [1963] AC 758 (HL); [1963] 1 All ER 341 ***(refd)***
Central Trust Co v. Rafuse [1986] 2 SCR 147 SC ***(refd)***
City of Kamloops v. Nielsen [1984] 10 DLR (4th) 641; [1984] 2 SCR 2 SC ***(refd)***
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

DW Moore & Co Ltd and others v. Ferrier and others [1988] 1 All ER 400; [1988] 1 WLR 267 CA ***(refd)***
Goh Kiang Heng v. Mohd Ali Abd Majid [1997] 4 BLJ 320; [1997] 4 CLJ Supp 320 HC ***(refd)***
Invercargill City Council v. Hamlin [1996] AC 624; [1996] 1 All ER 756 ***(refd)***
Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Peixeiro v. Haberman [1997] 3 SCR 549 ***(refd)***
Pirelli General Cable Works Ltd v. Oscar Faber & Partners (a firm) [1983] 1 All ER 65; [1983] 2 AC 1 ***(refd)***
Sparham-Souter v. Town & Country Developments (Essex) Ltd [1976] 1 QB 858 ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(5)
Limitation Act 1953, ss. 6(1), 29
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 14
Rules of the High Court 1980, O. 18 r. 19
Water Services Industry Act 2006, s. 123

Limitation Act [SIN], s. 24A
Limitation Act 1963 [UK], s. 14A
Limitation Act 1980 [UK], s. 2

For the appellant - Guok Ngek Seong; M/s Guok Partnership
For the respondent - Rewathy Krishnan Kutty; M/s Rastam Singa & Co

Reported by Sandra Gabriel

JUDGMENT

SM Komathy Suppiah JC:

[1] This appeal calls for the determination of when a cause of action in tort for the theft of water accrued for the purpose of ascertaining if the action was time-barred under the Limitation Act 1953 ("Limitation Act"). The defendant (appellant) maintains that the Magistrate was wrong in holding that the plaintiff's cause of action accrued when the wrongful act of the water theft first took place. The plaintiff (respondent) contends that it accrued when it discovered the water theft. The determination of this issue is fraught with difficulty because of conflicting judicial *dicta* on the subject.

[2] On 13 November 2013, the Magistrate allowed the plaintiff's application for summary judgment pursuant to O. 14 of the Rules of Court 2012 ('ROC'). The Magistrate rejected the defendant's argument that the plaintiff's claim was statute-barred and held that the period of limitation accrued when the plaintiff discovered the theft.

A **Background Facts**

[3] The plaintiff is Syarikat Bekalan Air Selangor aka as Syabas. It is the water distribution licensee under the Water Services Industry Act 2006 ('Water Services Act'). Syabas is licensed under the Water Services Act to supply treated water to consumers in Selangor who are account holders. The B defendant company is the owner of the premises at No. 37-3A, Jalan SBC 1, Taman Sri Batu Caves, 68100 Batu Caves, Gombak, Selangor Darul Ehsan and 39-3A, Jalan SBC 1, Taman Sri Batu Caves, 68100 Batu Caves, Gombak, Selangor Darul Ehsan (hereinafter collectively referred to as "the premises") and is an account holder with the plaintiff.

C **[4]** On 7 March 2003, the defendant closed its account with the plaintiff and Syabas disconnected water supply to the defendant's premises by removing the meter affixed to the pipeline connected to the defendant's premises. The removal of the meter meant that the premises no longer received any water supply.

D **[5]** However, on 14 May 2007, the plaintiff received a report from a member of the public about the theft of water taking place at the defendant's premises. On the same day, Syabas despatched a team of officers to the premises who found an unauthorised pipe connection tapping water off the E plaintiff's main pipe without a meter. By this illegal connection the defendant was able to receive water from the main pipe *albeit* without a meter to monitor the quantity being consumed.

[6] By a letter of demand dated 22 March 2013, the plaintiff through its solicitors demanded the payment of RM72,114.98 from the defendant being F the charges due for water that was stolen for 1,529 days during the period from 7 March 2003 till 14 May 2007. The figure was based on the statutory formula set out in the Water Services Act. On 2 May 2013, the plaintiff instituted this action to recover the sum due from the defendant and one Mohd Ariff bin Abdul Aziz, the person to whom the defendant had intended G to sell the premises during the material time, based in contract and tort. The plaintiff obtained default judgment against Mohd Ariff.

[7] The defendant in its defence, pleaded, *inter alia*, that the plaintiff's cause of action in contract and tort was barred by limitation. In the alternative, the defendant contended that it was Mohd Ariff bin Abdul Aziz H who had committed the wrongful act when he moved into the premises without its knowledge and consent.

[8] On 15 August 2013, the plaintiff filed the present application for summary judgment against the defendant. It was premised on the presumption contained in s. 123 of the Water Services Act which reads:

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> Where a service water pipe to any premises has been unlawfully connected to a public mains or to another service water pipe serving another premises, it shall be presumed that the unlawful connection was made by the owner or the occupier of the first-mentioned premises.

[9] The defendant opposed the application on the principal ground that the question of whether the claim was barred by limitation was a serious triable issue that ought to be decided at the trial. The argument did not find favour with the Magistrate who allowed the application. Hence, the present appeal.

The Limitation Act

[10] At common law there is no time limit on a person's right to bring an action for tort and this resulted in the courts being burdened with stale claims. Statutes of limitation were introduced and have been part of the legal system for decades.

[11] In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409 (SC), Hashim Yeop A Sani CJ (Malaya) explained the rationale for limitation regime in these words (at p. 76 (CLJ) and p. 413-414 (MLJ)):

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense. The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[12] The law relating to the limitation of actions in Malaysia is governed by the Limitation Act 1953. Section 6(1) of the Limitation Act prescribes a period of six years within which actions based on contract and tort must be instituted. For ease of reference, it is set out below:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-
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> (a) actions founded on a contract or on tort;
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> (b) actions to enforce a recognisance;
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> (c) actions to enforce an award;
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> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[13] The section provides that in respect of actions founded in contract or tort, the limitation period is six years from the date on which the cause of action accrued. It is trite law that a person has a right to sue in contract when a breach has occurred. See *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 (FC). It is also trite law that in an action in tort, save for those causes that are actionable *per se*, without proof of damage, such as claims based on libel,

assault or trespass to land or goods, damage is a requisite part of the cause of action. Thus, where a wrong is not actionable without actual damage, as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs. Accordingly, under the limitation regime, when a cause of action accrues, that person to whom the cause accrued must institute an action in court to sue within the time limited under s. 6 of the Limitation Act.

Issue On Appeal

[14] The plaintiff conceded that their claim for breach of contract was time-barred and their claim is now confined to tort.

[15] Therefore, the question that needs to be addressed is when, in the circumstances set forth in the statement of claim, the plaintiff suffered damage. If the plaintiff suffered damage when the water theft first started, then the claim in tort would be time-barred under s. 6 of the Limitation Act. On the other hand, if the cause of action did not accrue until the plaintiff discovered the water theft ("the discoverability rule") , then the claim is not caught by limitation. As such, the limitation issue turns on whether the discoverability rule has application to the plaintiff's cause of action in tort.

Arguments of Parties

[16] The defendant argued that the discoverability rule does not avail a plaintiff when dealing with a plea that a claim is statute barred by virtue of s. 6 of the Limitation Act. The principle, that time begins to run whether or not the damage could be discovered, is the basis of the defendant's submission.

[17] The defendant contended that the plaintiff suffered damage when the theft of water first started and not when it was discovered or detected. This triggered the plaintiff's cause of action which had expired before the filing of this action. It was argued that the Magistrate was therefore wrong in holding that the cause of action only accrued when the plaintiff discovered the water theft as the discoverability rule did not apply to s. 6.

[18] The defendant further argued that the discoverability rule encapsulated in s. 29 of the Limitation Act did not apply to the facts here as s. 29 only postponed the period of limitation only in instances where fraud or mistake is involved. Section 29 provides:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
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> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequence of a mistake.

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

The defendant argued that the limited application given to the discoverability rule demonstrated that Parliament must have intended that knowledge of the loss, injury or damage should be irrelevant in all other cases. The decision of the Magistrate, it was argued, therefore is contrary to s. 29.

[19] The plaintiff countered the above submission by contending that there was nothing in the language of s. 29 which indicated the exclusion of the discoverability rule in all other cases. It was argued that this proposition was supported by a number of decisions including *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519; [1995] 1 MLJ 504, *Goh Kiang Heng v. Mohd Ali Abd Majid* [1997] 4 BLJ 320; [1997] 4 CLJ Supp 320; [1998] 1 MLJ 615, and *AmBank (M) Bhd v. Kamariyah Hamdan & Anor* [2013] 5 MLJ 448: I shall refer to them after discussing the judicial opinion expressed in other jurisdictions on this area of the law.

Decisions From Other Jurisdictions

[20] The question of whether time starts running from the date of damage or the date of discoverability of the damage is a fundamental question of principle which has been the subject of much debate in recent years in different common law jurisdictions, in a variety of situations. Varying opinions have been expressed by the courts in these jurisdictions on the applicability of the discoverability rule to the limitation regime. See *Cartledge v. E Jopling & Sons Limited* [1963] AC 758 (HL); [1963] 1 All ER 341, *Central Trust Co v. Rafuse* [1986] 2 SCR 147, SC, *City of Kamloops v. Nielsen* [1984] 10 DLR (4th) 641; [1984] 2 SCR 2, SC, *DW Moore & Co Ltd and others v. Ferrier and others* [1988] 1 All ER 400; [1988] 1 WLR 267, CA.

[21] The English Court of Appeal in *Sparham-Souter v. Town & Country Developments (Essex) Ltd* [1976] 1 QB 858 decided that damage was suffered when it was detected or could have been detected with reasonable skill and diligence. In this connection, Lord Denning said (at p. 867):

> A builder negligently makes foundations for a house which are quite insufficient and in breach of the byelaws. The council's inspector negligently passes them as sufficient. The house is built and is sold by the builder to a purchaser, who sells it to another, and so on down a chain of purchasers. Some time later the house begins to sink and cracks appear in the structure owing to the insufficient foundations. The man who is the owner at that time has a cause of action against the builder and the council ... The cause of action accrues, not at the time of the negligent making or passing of the foundations, nor at the time when the latest owner bought the house, but at the time when the house began to sink and the cracks appeared. That was the first time that any damage was sustained. None of the previous owners had sustained any damage. Each

A had bought and sold the house at a full price in the belief that the foundations were sound. The only person to sustain the damage was the man who owned the house at the time when the house sank and the cracks appeared. It is only at that time that he can reasonably be expected to know that he may have a cause of action. It would be most unfair that time should run against him before he knows - or has any possibility of
B knowing - that he has a cause of action. Time should not begin to run against him until he knows of the defective foundations, or could, with reasonable diligence, have discovered it.

[22] The subsequent case which dealt with this issue was *Cartledge v. E Jopling* ([21] *supra*). The House of Lords held that the cause of action for
C the negligent causing of pneumoconiosis arose as soon as more than insignificant damage had been done by the inhalation of asbestos dust, even though that was long before any knowledge of the damage being done by the slow progression of the disease. *Cartledg*e established that a cause of action may accrue and time may run even though the plaintiff neither knows nor
D could know that he has suffered actionable damage. As Lord Reid said (at p. 771/2):

It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury
E is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action.

[23] To counter the injustice exposed in *Cartledge v. E Jopling*, the English Parliament introduced s. 14A to the Limitation Act 1963 which prescribe an
F additional period of three years from the date on which a plaintiff acquires the requisite knowledge of the damage or loss. The new provision applied only to actions for damages consisting of or including personal injuries. It extended the time limit for filing of actions for damages where material facts of a decisive character were outside the knowledge of the plaintiff until after
G the action would normally have been time-barred.

[24] In *Pirelli General Cable Works Ltd v. Oscar Faber & Partners (a firm)* [1983] 1 All ER 65; [1983] 2 AC 1 unsuitable construction material was used to construct a chimney. Within a year cracks had developed, but were not discovered for more than another seven years, by which time the action
H became time-barred. The House of Lords overruled *Sparham-Souter*, and applied the principle in *Cartledge* and held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or should with reasonable diligence
I have been discovered. The decision was based on s. 2 of the UK Limitation Act 1980 which is similar to our s. 6(1). The House of Lords acknowledged the injustice in their decision which had the effect of rendering a claim statute-barred even before a plaintiff became aware of the loss or damage. Lord Scarman (at [1983] 2 AC 1, at p. 19) said this:

> My Lords, I agree that the law is now as set out in the speech of my noble and learned friend, Lord Fraser ... But it is no matter for pride. It must be, as Lord Reid said in *Cartledge v. E Jopling & Sons Ltd* [1963] AC 758, [1963] 1 All ER 341, ... and quoted by my noble and learned friend in his speech, unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result, as Lord Pearce, also quoted by my noble and learned friend, said in the same case, is harsh and absurd.

[25] It was this potential injustice that can arise where a claim becomes statute-barred before a plaintiff becomes aware of its existence that led the Supreme Court of Canada to reject the rationale of the House of Lords in *Pirelli* in *City of Kamloops v. Nielsen* ([16] *supra*). In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. The Supreme Court decided that the cause of action did not accrue until the plaintiff became aware of the defects. It held:

> There are obvious problems in applying *Pirelli*. To what extent does physical damage have to have manifested itself? Is a hair-line crack enough or does there have to be a more substantial manifestation? And what of an owner who discovers that his building is constructed of materials which will cause it to collapse in five years time? According to *Pirelli* he has no cause of action until it starts to crumble. But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence. Lord Fraser and Lord Scarman were clearly concerned over this but considered themselves bound by *Cartledge*. The only solution in their eyes was the intervention of the legislature.
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> This Court is in the happy position of being free to adopt or reject *Pirelli*. I would reject it. This is not to say that *Sparham-Souter* presents no problem. As Lord Fraser pointed out in *Pirelli* the postponement of the accrual of the cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence. *Dennis v. Charnwood Borough Council*, [1982] 3 All E.R. 486, is a classic illustration of this. It seems to me, however, to be much the lesser of two evils.
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> Applying *Sparham-Souter* then to s. 738(2) of the Municipal Act which bars an action on the expiration of one year from the date on which the cause of action arose, the plaintiff's cause of action would not have arisen until November 1978 when his plumber, called to fix a burst pipe, drew the damage to his attention.

[26] The discoverability rule that was endorsed in *Kamloops* has been described by many judges as a "judge-made interpretative tool" for construing limitation statutes. It has been applied in a variety of situations. It has been invoked to postpone the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history". In *Peixeiro v. Haberman*, [1997] 3 SCR 549 the Canadian court delayed the start of a limitation period

under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim under the scheme.

[27] The Privy Council had occasion to consider this area of the law in *Invercargill City Council v. Hamlin* [1996] AC 624; [1996] 1 All ER 756, which was an appeal from the Court of Appeal of New Zealand. This was another claim against a local authority for negligent inspection of foundations. In the course of giving the judgment of the committee Lord Lloyd described the decision in *Pirelli* as unfortunate and noted that it had received much judicial and academic criticism. He said (at p. 648):

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered he suffers no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
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> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious ...
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> In other words the cause of action accrues when the cracks become so bad and all the defects so obvious, that any reasonable home-owner would call in an expert. Since the defects would then be obvious to a potential buyer or his expert, that marks the moment when the market value of the building is depreciated and therefore the moment when economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs if it is reasonable to repair, or the depreciation in the market value if it is not ...
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> This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention and which led to the rejection of *Pirelli* by the Supreme Court of Canada ... The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. ...
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> *It is regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle. Whether the Pirelli case [1983] 2 AC 1 should still be regarded as good law in England is not for their Lordships to say. What is clear is that it is not good law in New Zealand.* (emphasis added)

[28] The cases quoted above illustrate that New Zealand and Canada have adopted different solutions to the potential injustices which arise from a strict application of the primary limitation period. In those countries, judicial solutions have been found.

[29] In Singapore there is express codification of the discoverability rule in s. 24A of the Limitation Act in relation to latent injuries and damage. Pursuant to s. 24A time does not run until the date at which the plaintiff knows or ought reasonably to know that he has a cause of action. An action is statute-barred under this provision only if it is commenced three years after the date when such requisite knowledge was first acquired.

Local Decisions

[30] I now move on to consider the decisions of our own courts. At the outset, it should perhaps be mentioned there is no legislation corresponding to the Singaporean s. 24A in the Malaysian Limitation Act.

[31] The applicability of the discoverability rule to s. 6 of the Limitation Act has received judicial consideration in Malaysia. Before examining the cases and the principles which they disclose, it is as well to bear in mind that the subject has led to a divergence of judicial opinions.

[32] One of the first cases that grappled with this issue is *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* ([13] *supra*). The plaintiff there relied on a valuation report prepared by the defendant to disburse a loan to a borrower on 14 September 1984. The valuation report stated there was a double storey house erected on the property and it was valued at RM260,000. It was subsequently discovered that the valuation was false as there was no house on the property. The plaintiff then brought an action against the defendant for professional negligence and/or fraud. The defendant applied to strike out the claim under O. 18 r. of the 19 Rules of the High Court 1980, contending that the claim arose on 14 December 1984 and was time barred. Great reliance was placed on the statement of law enunciated in *Pirelli*.

[33] His Lordship Shaik Daud J (as he then was) declined to follow *Pirelli* and dismissed the application. He held that the discoverability rule applied. In his judgment, he explained (at p. 521 (CLJ) and p. 508 (MLJ)):

> The question, therefore, here is when did the cause of action arise? Learned counsel for the defendant reckons that the cause of action arose on 14 December 1984 when the plaintiff disbursed the loan to the borrower and when the borrower failed to repay. The learned counsel for the plaintiff on the other hand contends that this being a claim for negligence and fraud, not against the borrower, the fact that the borrower defaulted from the beginning is immaterial. The negligence and fraud here is not by the borrower but by the defendant as valuer. The fact that the borrower defaulted is another issue altogether for which the plaintiff is also entitled to sue the borrower. The borrower's failure to repay the loan is another and a separate loss altogether.

> *Therefore, the cause of action should not be from the time the borrower defaulted but from the time the plaintiff discovered the negligence and/or fraud of the defendant.* With this contention, I agree. The plaintiff's claim herein has nothing to do with the default by the borrower, which default has no connection with the plaintiff's alleged negligence and/or fraud. The plaintiff here is not claiming for the repayment of the loan it gave to the borrower but they are claiming as special damages the amount they lost as result of the defendant's negligence and/or fraud. *Therefore, I agree that the date the cause of action arose here ought not to be the date the borrower defaulted but ought to be the date the plaintiff discovered the negligence and/or fraud*. (emphasis added)

[34] The same issue was addressed in *Goh Kiang Heng* ([19] *supra*) where on 21 January 1984, the plaintiff entered into a sale and purchase agreement with the owner of five plots of land for the purchase of the same. The defendant, an advocate and solicitor, witnessed the agreement. After settlement of the full purchase price, the plaintiff signed and delivered to the defendant on 30 November 1984 a memorandum of transfer to effect the transfer of title. In mid 1985, the plaintiff enquired about the transfer but received no response from the defendant. On 27 March 1991, the owner sold the land to a new owner. On 30 March 1991, the plaintiff filed an action against the defendant claiming, *inter alia*, specific performance and damages. The defendant filed an application to strike out the action on the ground that it was caught by limitation.

[35] His Lordship Augustine Paul JC (as he then was), after reviewing the decisions on this subject from the other jurisdictions, including *Invercargill City* (*supra*), held:

> In my opinion, the rejection of *Midland Bank Trust Co Ltd* in *Bell* must be viewed in the light of the statement of the law in *Wardley* where it was held that the answer to the question when a cause of action for negligence causing economic loss accrues, as in this appeal, requires a consideration of the precise interest infringed by the negligent act or omission. With economic loss, as with other forms of damage, there has to be actual damage. Prospective loss is not enough. The infringement in the appeal before me is the non-registration of the land in favour of the plaintiff. That was the task that the defendant was contractually bound to perform. The duty to register the land in the name of the plaintiff was a continuing one till registration was effected. The damage suffered by the plaintiff will be ascertainable only when it becomes impossible to register the land in his name - that is to say, in 1991 when it was conveyed to the new owner. It is only at that point of time that the plaintiff can be said to have suffered any damage which is a necessary ingredient for an action founded on tort. That would be the time when all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action has accrued (see *Credit Corp (M) Bhd v Fong Tak Sin and Invercargill City Council v. Hamlin*). Prior to that point of time, there will only be prospective loss and not actual damage which is necessary to sustain a claim for economic loss.

> To equate actual damage with reduced value and prospective liability is, to my mind, artificial and unrealistic. I would therefore, and with respect, adopt the reasoning in *Midland Bank Trust Co Ltd* and *Wardley*. Accordingly, it is my view that the plaintiff's cause of action in both contract and tort is not time-barred. They are concurrent in that the cause of action based on contract and tort accrued in 1991. In the case of the cause of action founded on contract, the duty of the defendant was to effect a valid registration of the transfer. Consequently, the breach occurred only at the moment when this became impossible, that is to say, when the land was sold to the new owner. In the case of the cause of action founded on tort, the cause of action accrued when it was too late to effect the transfer. That would be the time when the plaintiff suffered actual damage. I refrain from making a finding on whether the plaintiff has pleaded a cause of action in tort as that may pre-judge the issues to be determined at the trial.

[36] This Court of Appeal had the opportunity to examine the matter in the case of *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784. In that case, the appellant bank had granted a loan to MYT Builders Sdn Bhd. The security was a third party assignment of land known as Lot 465 which was part of Lot 57436 that was registered in the name of Majlis Bandaraya Ipoh ("MBI"). By a power of attorney, MBI had authorised a developer to enter into contracts of sale in respect Lot No. 57436, the developer had entered into sale and purchase agreement with the assignor in respect of Lot 465. The respondents, a firm of solicitors, were instructed by the appellant to prepare the loan documentation including the third party assignment. After execution of the third party assignment dated 6 April 1999, the appellant released the loan to the borrower. Sometime in November 2000, the borrower defaulted on the loan. The appellant then sought to enforce the third party assignment by way of a private auction. But the consent of MBI for the sale could not be obtained. The action of the appellant against the MBI for that consent was withdrawn. Thereafter, the appellant filed action against the respondents on 17 March 2006 based on negligence. It was alleged that the respondents were negligent in failing to advise the appellant that the assignor did not have a good title to Lot 465. The trial judge held that the appellant's claim was time-barred as the limitation period for contract and tort ran from the date the alleged cause of action first accrued and not from the alleged date when the cause of action was discovered.

[37] On appeal, the Court of Appeal applied the principle in *Pirelli* and rejected the applicability of the discoverability rule to s. 6. It was decided that the said rule applied only to those instances mentioned in s. 29 of the Act. Abdul Malik Ishak JCA explained (at p. 670 (CLJ) and p. 791 (MLJ)):

> :We have read s. 29 of the Limitation Act 1953 and we say that this is the only provision which allows a plaintiff to postpone the limitation period on the grounds that the facts are not known to the plaintiff. We say that the limitation period may be postponed only if the cause of action is based on fraud of the defendant or is concealed by the defendant or is an action for relief from consequences of a mistake.

A And, later (at pp. 678-679 (CLJ) and p. 798 (MLJ)):

> Limitation, under s. 14A of the UK Limitation Act 1980, only begins to run either six years from the date on which the cause of action accrues or three years from the 'starting date', if the three years period expires later. 'Starting date' is defined in s. 14A(5) of the UK Limitation Act 1980
B to mean the 'earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action'. It is now crystal clear that s. 14A(5) of the UK Limitation Act 1980 caters for negligent actions where the facts relevant to the cause of action are not known on the date of
C accrual of the cause of action. However, there is no similar or equivalent amendment to our Limitation Act 1953. So the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.
>
D There is only one test in Malaysia in order to ascertain limitation. It is housed in s. 6(1)(a) of the Limitation Act 1953.

And further (at pp. 680 and 682 (CLJ) and pp. 799 and 801 (MLJ)))

> It is trite law that a cause of action founded in tort accrues when the appellant suffers damage (*Goh Kiang Heng v. Hj Mohd Ali bin Hj Abd Majid*)
E ...
>
> Applying all these salient authorities to the appeal at hand, it is our judgment that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have, on that date, been encumbered with the liability of
F dispensing the loan to the borrower in exchange for an invalid third party assignment. It is also our judgment, on the available evidence, that the appellant's loss would have crystallised the moment the loan sum was disbursed to the borrower in early April 1999 in exchange for an invalid third party assignment. Time started to move from 6 April 1999.

G **[38]** In a recent case, another panel of the Court of Appeal in *AmBank (M) Bhd v. Kamariyah Hamdan & Anor* [2013] 5 MLJ 448 departed from the principle in *Abdul Aziz*. There, a bank had issued a third party notice against a firm of solicitors premised on the fact that they had been negligent in advising it to release a loan to a company based on an invalid charge. The solicitors applied to strike out the notice on the ground that the bank's claim
H for contribution and indemnity was statute-barred as damage was suffered when the loan was released on 1 September 1997 and the third party notice was only issued in 2006. All the authorities in this area, including *City of Kamloops*, were reviewed by Jeffrey Tan JCA. Having conducted that exercise, he discarded the date of physical damage in favour of the date of
I discoverability. His Lordship said (at p. 463):

> Likewise, in the instant case, the appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence. Indeed, there was no reason for the

> appellant to suspect negligence, as effectively the respondents had advised the appellant that the charge was a valid charge. And the release of the loan only evinced that the appellant on 1 September 1997 could not have discovered that something could be amiss about the charge. The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge. On 28 October 2005, the appellant applied for leave to issue the said third party notice, which leave was granted on 2 January 2006. On 20 January 2006, the said third party notice was issued. Evidently, the said third party notice was issued within six years from the date when the material facts on which the third party notice was based ought to have been discovered by the appellant by the exercise of reasonable diligence.

His Lordship in departing from *Abdul Aziz*, explained (at p. 464):

> All except that in view of the aforesaid decisions of the apex court on the date of accrual of the cause of action, and the discoverability rule as espoused and or endorsed in *Wardley, Central Trust*, and *Law Society*, **we must respectfully decline to defer to the ruling that time would run regardless of whether damage was or could be discovered.**
>
> The said third party notice was struck out on the authority of *Melton v. Walker and Stanger*, *Costa v. Georghiou & ors* and *DW Moore & Co Ltd v. Ferrier*, but without the benefit of the subsequent development in the law relating to negligence which would not support the finding that the cause of action accrued when the loan was released on 1 September 1997. Rather, based on all the authorities we have cited and relied upon, we would say that the cause of action against the respondents only accrued when the appellant was served with the writ of summons. The said third party notice was not statute barred. (emphasis added)

[39] The decisions of the Court of Appeal in *Abdul Aziz* and *Kamariyah* conflict with each other. This court is consequently free to choose which of these two conflicting decisions it considers has stated the law correctly. To recap, the court in *Abdul Aziz* rejected the concept of a discoverability test and held that the limitation runs from the date on which damage happens or occurs and not on the date that the damage or defect was discoverable. On the other hand, *Kamariyah* decided otherwise.

[40] Of the two possible interpretations I prefer the one adopted in *Kamariyah* which has the date of discoverability as the date of accrual as it is more just and appears to be the preferred view in many jurisdictions. It seems to me to be unreasonable and untenable in principle that a cause of action should be held to accrue before it is possible to discover any injury. To require a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is unjust and a compelling consideration for my decision. The diligence rationale for the limitation regime would not be undermined by the application of the discoverability

rule. Any additional difficulty that a defendant may have to face in dealing with a claim years afterwards cannot be a justification to deny a plaintiff's right to bring an action before he even knows he has one. It is inequitable to accept a rule of interpretation which would favour the defendant at the expense of the plaintiff.

[41] The court is also not constrained by the language in s. 29 of the Limitation Act to adopt the interpretation in *Kamariyah*. The Limitation Act does not contain any definition of the phrase "cause of action". As time is not expressed to run from the date of the occurrence of the damage there is no requirement for it to be interpreted as if it was. The policy of the law should be to advance rather than to deny or retard a plaintiff the accrual of a cause of action.

[42] Lastly, and most crucially, it is important to note that s. 6(1) of the Limitation Act is not worded to read that an action is to be commenced within a specified time from the happening of a specific event as is the case with s. 7(5) of the Civil Law Act 1956 and s. 2(a) of the Public Authorities Protection Act 1948. I cite both these two provisions for easy reference. Section 7(5) reads:

> Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

And s. 2(a) of the Public Authorities Protection Act 1948:

> The suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[43] In *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751 the Federal Court held that only the limitation periods mentioned in the Civil Law Act 1956 and Public Authorities Protection Act 1948 are absolute. The judgment of the Federal Court in my view, implicitly supports the decision in *Kamariyah*.

[44] Reverting back to the facts in the instant case, it is in evidence that the plaintiff did not know and could not have discovered the illegal pipe connections at the defendant's premises until it was alerted by a member of the public in May 2007. Applying the principle in *Kamariyah*'s case, the plaintiff's cause of action only accrued in May 2007 when the plaintiff discovered the water theft.

[45] In the result, I find that the Magistrate was right in concluding that there was no triable issue and rejecting the defence of limitation. The plaintiff's writ issued on 2 May 2013, had a valid and subsisting cause of action against the defendant which was not foreclosed by s. 6 of the Limitation Act.

Conclusion

[46] The principle, in my judgment, that underlies the Limitation Act is that time runs against a plaintiff only from the time he knows or becomes aware of his rights. The purpose of limitation is to ensure that those who go to sleep on their claims should not be assisted by the courts. For the reasons I have indicated, the appeal is dismissed with costs of RM2,000.

[47] Finally I wish to pay tribute to counsels for their well-researched and comprehensive written submissions.